

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

To be argued by :
STANLEY SCHIMMEL, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-1250

7cc
B
P/S

UNITED STATES OF AMERICA,

Appellee

Docket #75-1250

- against -

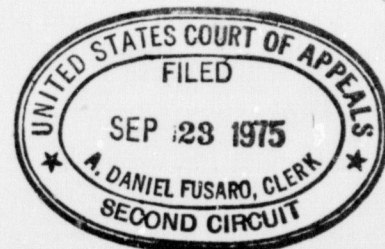
RICHARD THRASHER,

Appellant.

APPELLANT'S APPENDIX
PURSUANT TO
ANDERS V. CALIFORNIA .

ON APPEAL FROM A JUDGEMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

STANLEY SCHIMMEL
Attorney for Appellant
32 Court Street
Brooklyn, N.Y. 11201
(212) 625-1200



PAGINATION AS IN ORIGINAL COPY

A P P E N D I X

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EJB:RJD:mb
F.#733,313

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

73 CR 600

UNITED STATES OF AMERICA

-against-

SUPERSEDING
INDICTMENT

Cr. No. _____

BILLY AUSTIN
JOHN BRYANT
ALVIN COOPER
ROBERT RAY DANIELS, a/k/a "Dutch Schultz"
HARRIET EVANS, a/k/a "Harriet Clark"
JOSEPH FERNANDEZ, a/k/a "Slim"
WALTER GILMORE
GATTIS HINTON
FRANK MATTHEWS
BONNIE MC CALLUM
GERALD MIMS, a/k/a "Pop"
WILLIAM MOORE, a/k/a "B. I."
JOSEPH POLITE, a/k/a "Junior"
LARRY STEWART
RICHARD THRASHER
CLINTON WHITE, a/k/a "Angel",

T. 21, U.S.C. §173
T. 21, U.S.C. §174
T. 21, U.S.C. §846
T. 21, U.S.C. §848
T. 18, U.S.C. §2

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ JUN 19 1973 ★

Defendants. TIME A.M. _____
P.M. _____

THE GRAND JURY CHARGES:

COUNT ONE

From on or about the 1st day of June 1970 up to and including the 17th day of January 1973, both dates being approximate and inclusive, within the Eastern District of New York, and elsewhere, the defendants BILLY AUSTIN, JOHN BRYANT, ALVIN COOPER, ROBERT RAY DANIELS, a/k/a "Dutch Schultz", HARRIET EVANS, a/k/a "Harriet Clark", JOSEPH FERNANDEZ, a/k/a "Slim", WALTER GILMORE, GATTIS HINTON, FRANK MATTHEWS, BONNIE MC CALLUM, GERALD MIMS, a/k/a "Pop", WILLIAM MOORE, a/k/a "B.I.", JOSEPH POLITE, a/k/a "Junior", LARRY STEWART, RICHARD THRASHER, CLINTON WHITE, a/k/a "Angel", together with Donald James, named herein as a co-conspirator but not as a co-defendant, and others known and unknown to the Grand Jury, unlawfully, wilfully and knowingly did com-

bine, conspire, confederate and agree together and with each other to violate prior to May 1, 1971, Sections 173 and 174 of Title 21, United States Code, and on and after May 1, 1971 to violate Sections 812, 841(a)(1), 841(b)(1)(A) of Title 21, United States Code.

(1)

(1) It was part of said conspiracy that prior to May 1, 1971 the defendants unlawfully, wilfully and knowingly would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large amounts of heroin, a narcotic drug, after such narcotic drug had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

(2) It was further a part of said conspiracy that on and after May 1, 1971 up to and including January 17, 1973, the defendants knowingly and intentionally would possess with intent to distribute and would distribute large amounts of heroin, a Schedule I narcotic drug controlled substance.

(3) It was further a part of said conspiracy that the defendants would conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities.

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed within the Eastern District and elsewhere:

OVERT ACTS

(1) In or about December 1970, in the vicinity of Tapscott Street and Dumont Avenue, Brooklyn, New York, the defendant FRANK MATTHEWS met with the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz" and the defendant HARRIET EVANS, a/k/a "Harriet Clark".

(2) On or about April 9, 1971, in Brownie's Bar on St Marks Avenue, Brooklyn, New York, the defendant RICHARD THRASHER met with Donald James, named herein as a co-conspirator

but not as a defendant.

(3) In or about October 1970, in the vicinity of Montgomery Street and Rogers Avenue, Brooklyn, New York, the defendant WILLIAM MOORE, a/k/a "B.I." met Donald James, named herein as a co-conspirator but not as a defendant.

(4) On or about May 24, 1972, at 961 Belmont Avenue, Brooklyn, New York, the defendant GERALD MIMS, a/k/a "Pop" met with the defendant JOSEPH POLITE, a/k/a "Junior" and the defendant BONNIE MC CALLUM.

(5) In or about January 1971, in the vicinity of East 92nd Street and Clarkson Avenue, Brooklyn, New York, the defendant GATTIS HINTON, a/k/a "Bud" met with Donald James, named herein as a co-conspirator but not as a co-defendant.

(6) On or about April 9, 1971, in the vicinity of Nostrand and St. Marks Avenues, Brooklyn, New York, the defendant LARRY STEWART met with Donald James.

(7) In or about October 1971, in the vicinity of Fenimore Street and Albany Avenue, Brooklyn, New York, the defendant JOHN BRYANT, the defendant WALTER GILMORE, the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", the defendant HARRIET EVANS, a/k/a "Harriet Clark" and the defendant CLINTON WHITE, a/k/a "Angel" had a meeting.

(8) In or about November 1970, in the vicinity of Gates and Classon Avenues, Brooklyn, New York, the defendant WILLIAM MOORE, a/k/a "B.I." met with the defendant JOSEPH FERNANDEZ, a/k/a "Slim".

(9) In or about October 1970, at 457 Schnectady Avenue, Brooklyn, New York, the defendant ALVIN COOPER met with the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz". (Title 21, United States Code, Section 173, Section 174 and Section 846.)

COUNT TWO

On or about the 15th day of January 1971, within the Eastern District of New York, the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz" did receive, conceal, sell and

facilitate the transportation, concealment and sale of approximately 23.45 grams of heroin hydrochloride, a narcotic drug, after it had been imported and brought into the United States, knowing the same to have been imported and brought into the

United States contrary to law.

(Title 21, United States Code, Section 173, Section 174;
Title 18, United States Code, Section 2.)

COUNT THREE

On or about the 9th day of April 1971, within the Eastern District of New York, the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz" and the defendant RICHARD THRASHER did receive, conceal, sell and facilitate the transportation, concealment and sale of approximately 150.4 grams of heroin hydrochloride, a narcotic drug, after it had been imported and brought into the United States, knowing the same to have been imported and brought into the United States contrary to law.

(Title 21, United States Code, Section 173 and Section 174;
Title 18, United States Code, Section 2.)

COUNT FOUR

From on or about the 1st day of May, 1971 up to and including the 10th day of October, 1972, within the Eastern District of New York, and elsewhere, the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", did knowingly and intentionally engage in a continuing criminal enterprise as defined in Title 21, United States Code, Section 848(b), in that the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", did knowingly and intentionally commit violations of Title 21, United States Code, Section 841(a)(1) and Section 846 as alleged in part in Count One of this Indictment, which violations were part of a continuing series of violations of said statutes undertaken in concert with at least five other persons with respect to whom the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", occupied the position of organizer and other positions of a supervisory and managerial nature and from which continuing criminal enterprise the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", obtained substantial income and resources.

In addition to the penalties provided for by Title 21, United States Code, Section 848(a)(1), the defendant ROBERT RAY DANIELS, a/k/a "Dutch Schultz", shall, upon conviction in this

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in such enterprise together with his interest in, claims
against, and property and contractual rights of any kind
affording a source of influence over such enterprise.
(Title 21, United States Code, Section 848.)

A TRUE BILL.

Lillian Cole
FOREMAN.

Robert A. Moneys
UNITED STATES ATTORNEY

No. _____

UNITED STATES DISTRICT COURT

Eastern District of New York

Criminal Division

THE UNITED STATES OF AMERICA

vs.

BILLY AUSTIN, ET AL.,

Defendants.

INDICTMENT

T. 21, U.S.C. \$173
T. 21, U.S.C. \$174
T. 21, U.S.C. \$846
T. 21, U.S.C. \$848
T. 18, U.S.C. 67

A true bill,

Forfeited.

Filed in open court this _____ day
of _____, A. D. 19____

Clerk.

Bail, \$_____

GPO 902-482

RAYMOND J. DEARIE
Assistant U. S. Attorney
596-3054

CRIMINAL DOCKET

73 CR 600

MISCELLANEOUS
TRAVIA, J.

TITLE OF CASE		ATTORNEYS
THE UNITED STATES		For DEFT : DEFT-GILMORE
U.S.		Robert Schmukler- 121
✓ BILLY AUSTIN	BONNIE MC CALLUM	Schermerhorn St. Brooklyn
JOHN BRYANT ✓	GERALD NIMS ("non")	834-1144
ALVIN COOPER	WILLIAM MOORE ("B.I.") ✓	for deft. BRYANT:
✓ ROBERT RAY DANIELS ("DUTCH SCHULTZ")	JOS. POLITE	Jeffrey Tillman, 91 Bdw NYC. 10013-925-8844
HARRIET EVANS ("Harriet Clark")	LARRY STEWART	For Defendant: MCCOLLUM-
✓ JOSEPH FERNANDEZ ("Slim")	RICHARD THRASHER	Richard Rosenkranz-66 Co
WALTER GILMORE ✓	✓ CLINTON WHITE	Street- Brooklyn, N.Y.
GATTIS HINTON		875-9440
FRANK MATTHEWS		for deft. NIMS: Bruce St
Violation of Narcotics Laws.		-60 E. 42nd St. NYC. 661

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISB
Fine,		6/7/73	John J. Gilmore (Deft)		
Clerk,			(Thrasher)		
Marshal,		6/7/73	John J. Gilmore (Deft)	5	
Attorney,		6/26/73	Walter Gilmore		
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
6/19/73	Superseding Before JUDD, J.-/Indictment filed.
6/22/73	Notice of Readiness for Trial filed. (W. GILMORE, J. FERNANDEZ, J. COOPER, H. EVANS, R. DANIELS)
6/22/73	Petition for Writs of Habeas Corpus Ad Prosequendum filed (H. EVANS & J. FERNANDEZ)
6/22/73	By TRAVIA, J. - Writs issued, ret. 7/9/73. (H. EVANS & J. FERNANDEZ)
6/22/73	Notice of Readiness for Trial filed (THRASHER, STEWART, POLITE, MOORE, MC CALLUM, NIMS, MATTHEWS)
7/2/73	Notices of Appearances filed. (for defts MOORE, DANIELS., BRYANT, MATTHEWS, MC COLLUM and THRASHER)
7/2/73	By TRAVIA, J. - Order appointing counsel filed. (LARRY STEWART)
7/2/73	Before TRAVIA, J. - Case called- Defts DANIELS, BRYANT, AND MOORE or counsel present-Defts waive reading of the indictment and each case

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DATE	PROCEEDINGS
	pleas of not guilty-Bail cont'd to BRYANT & MOORE-Deft DANIELS, bail set at \$10,000 Surety Bond-Defts COOPER & POLITE present without counsel-Court enters a plea of not guilty-Court assigns P. Passalacqua as counsel for deft-Bail set at 10,000.00 Surety Bond for COOPER-Bail cont'd as to Polite -Deft THRASHER, NIMS & MC COLLUM and counsel present-Deft arraigned and enters a plea of not guilty-Bail cont'd -Deft LAIRY STEWARD present without counsel-Court enters a plea of not guilty-Court assigns G. WELSH as counsel for deft -Bail set at \$10,000.00 surety bond-30 days for motions is granted to all defts-Defts AUSTIN, GILMORE, HINTON, MATTHEWS and WHITE not present.
7/5/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (W. GILMORE)
7/5/73	By TRAVIA, J.- Writ issued, ret. 7/6/73.
7/6/73	By TRAVIA, J.- Order appointing counsel filed. (COOPER) & (POLITE)
7/9/73	Before TRAVIA, J.- Case called- Deft GILMORE and counsel present-Deft waived reading of indictment and enters a plea of not guilty-10 days for motions to get new counsel-Deft in state custody.-Deft EVANS & FERNANDEZ and counsel present-Deft waive rereading of the indictment and each enters a plea of not guilty-Bail set at \$10,000.00 for deft EVANS_R -Bail cont'd as to deft FERNANDEZ 30 days for motions
6/9/73	Notice of Appearance filed. (EVANS)
7/9/73	Writ ret'd and filed. Executed. (W. GILMORE and EVANS)
7/3/73	Before TRAVIA, J.- Case called- On motion of AU'SA Dearie for Bench Warrant Bench Warrant ordered and bench warrant issued (MATTHEWS)
7-23-73	Notice of Motion filed for Bill of Particulars, Discovery (deft Polite) (ret. 7-25-73)
7-23-73	Notice of Motion filed for Bill of Particulars, Discovery (deft COOPER) ret. July 26, 1973.
7-26-73	Before TRAVIA J - Case called - motion for Bill of Particulars & Inspection and Marked Off Calendar. (defts COOPER & POLITE)
8/28/73	Notice of Motion filed, ret. ^{9/21/73} 8/28/73 re: for a bill of particulars, etc. (RICHARD THRASHER)
9-21-73	Before Travia J - Case called - Motion for Bill of Particulars marked off. (Richard Thrasher)
10/2/73	Writ ret'd and filed- Executed (FERNANDEZ)
10-4-73	Before Travia J - Case called - deft Clinton White & counsel E. Kelly of Legal Aid present - deft arraigned on this case & relating case 73 CR 101 and enters a plea of not guilty on both cases - order appointed counsel signed.
10-4-73	By Travia J - Order filed appointed counsel for deft WHITE

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CRIMINAL DOCKET

DATE	PROCEEDINGS
12-28-73	Before TRAVIA, J. - Case called - Deft Austin brought into court on a bench warrant - Deft present without counsel - Court appoints John C. Corbett as counsel - Deft waives reading of the indictment and the court enters a plea of not guilty - Bail fixed at \$100,000 Surety Do
12-23-73	Bench warrant ret'd and filed - executed (AUSTIN) (inserted into this
12-13-73	By TRAVIA, J. - Order appointing counsel filed (AUSTIN) (filed in the
1-24-74	Letter dated Jan 23, 1974 filed received from Chambers from Asst Raymond Dearie (re bail of deft Wm. Moore)
1-24-74	By WEINSTEIN J - Order filed that the Govt will prepare the necessary Order as requested by the Clerk after obtaining the consent of the deft. (Order filed 1/30/74)
1/25/74	Before TRAVIA, J. - Case called - (Deft not present - (deft J. POLITE) Deft in custody but his atty present - Hearing held - Ad'd to 2/1/74
2-1-74	Before TRAVIA J - case called - motion for reduction of bail (JOSEPH POLITE) - Bail conditions amended to \$100,000.00 personal recognizance bond to be signed by Mr. & Mrs. John Polite and Mr. Joseph Polite plus deed to the house at 21 Eldert Street, Brooklyn, N.Y.
2-8-74	By WEINSTEIN, J. - Order filed that the order of Judge Rosling dated 1-13-72, releasing bail in the amount of \$7,500 to John C. Moore re to 68CR349 and 68CR351 is hereby vacated - and the Clerk shall cancel check in the amount of \$7,500 and shall credit \$7,500 to John C. Moore and retain custody of this amount as partial security for the \$250. bond previously executed by the deft William Moore and consent of U.S. Attorney is to be affixed before this order becomes effective (Order filed in 73 CR 101) (consented to by A.U.S.A. Dearie on 2
3-12-74	Notice of Motion filed & Memorandum of Law in support of motion for Discovery as to deft Billy Austin (ret. March 15, 1974)
3/15/74	Before TRAVIA, J. - Case called - Motion for an order directing cert discovery and inspection, etc. - Motion consented to. (BILLY AUSTIN)
3-28-74	Magistrate's file 74 M 435 inserted into CR file.
4-3-74	Letter dated 3-28-74 received from chambers of Judge Travia and filed as a motion for reduction of bail. (Billy Austin)
4-3-74	Letter dated 3-29-74 received from chambers of Judge Travia and filed as a motion for reduction of bail. (Billy Austin)
4-3-74	Letter dated 4-2-74 from Atty John C. Corbett received from chambers of Judge Travia and filed as a motion for reduction of bail. (Billy Austin)

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DATE	PROCEEDINGS
5-17-74	Before TRAVIA, J.- Case called- Deft BILLY AUSTON and counsel present-Deft motion to reduce bail to \$25,000 Surety Bond granted-Deft to report every Friday Morning at 11:00 A.M. to U.S. Attorney- Deft CLINTON WHITE and counsel present-Deft's motion to reduce bail to \$2,500 Surety Bond-Case adjd to 6-7-74 for status report
6/7/74	Before TRAVIA, J.- Case called- Case held in abeyance -Subject to a telephone call
8-1-74	Notice of Motion filed compelling defts DANIELS, EVANS, COOPER & BRYANT to furnish handwriting exemplars, etc (returnable 8-9-74)
8-7-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Evans)
8-7-74	By NEAHER, J - Writ Issued, ret. 8-16-74 (Evans)
8-9-74	Before NEAHER, J - case called - adjd to 8-16-74(Austin-for compelling defts to furnish handwriting exemplars, etc.)
8-16-74	Before Neaher, J- case called - motion argued and motion granted - Order to be submitted by the atty for the Govt.
8-16-74	Motion granted on specified conditions. Order to be submitted by the Govt (see Judges notation on reverse of motion papers)
8-20-74	Petition for writ of habeas corpus ad prosequendum filed (COOPER)
8-20-74	By NEAHER, J.- Writ issued, -Ret. 8-26-74 (COOPER)*
8-21-74	Writ ret'd and filed - Executed (Evans)
9-6-74	Writ ret'd and filed- executed(COOPER)
9-11-74	By NEAHER, J - Order filed that the defts Daniels, Harriet Evans, Cooper & John Bryant furnish handwriting exemplars in the above case, etc. (see Order for details) Order dated Aug. 19, 1974 but received and filed in Clerks Office on 9-11-74.
9/18/74	Notice of Motion, ret. Sept. 27, 1974 re: to dismiss the indictment as to deft Austin filed.
9/18/74	Memorandum on behalf of deft Billy Austin in Support of Motion to dismiss the indictment filed.
9-27-74	Before TRAVIA J - case called - motion to dismiss is withdrawn(Austin) defts motion for reduction of bail granted - cash bail of \$2500.00 to be posted.
9-30-74	Notice of motion to dismiss filed- and Memorandum of Law filed(CLINTON WHITE)
10-4-74	Before Travia J - case called - motion to dismiss withdrawn (White)
10-21-74	By Schiffman, Magistrate - Order for acceptance of cash bail filed (BILLY AUSTIN)
11/30/74	Writ ret'd and filed- executed (ALVIN COOPER)
11-14-74	Magistrate's file 74 M 1518 inserted into CR file.

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DATE	PROCEEDINGS
2/14/75	Writ ret'd and filed- executed (STEWART)
2-25-75	Writ ret'd and filed - executed (COOPER)
2/28/75	Before MISHLER, CH. J. - Case called- Motion to modify bail argued- Motion granted Bail modified to the release of the homes of J. Dunkin and P. Mims as to the deft J. Mims
2/28/75	Notice of Motion, INX for lack of a fast and speedy trial filed. (no ret. date).
3/4/75	By MISHLER, CH. J. - Order filed that the deed to property owned by Mr. and Mrs. Dunham be released and exonerated as collateral to secure bail, etc. (MIMS) (order entered in 73CR101)
3/6/75	Notice of motion to dismiss filed ret. 3/14/75 (ALVIN COOPER)
3/7/75	Petition of Habeas Corpus Ad Prosequendum filed (A. COOPER)
3/7/75	By PLATT, J. - Writ issued, ret. 3/14/75
3/10/75	Notice of motion to dismiss for lack of speedy trial filed (EVANS)
3/14/75	Before MISHLER, CH. J. - Case called- Pre-trial conference held- All counsel present except Nancy Rosner and John C. Corbett- All defendants present except defendant Austin, Evans, Fernandez, Mathews, Polite, Stewart and Thrasher- defendant Bryant, Mims and Moore agree to have their counsel represent them and are aware of a possible conflict of interest- Motion by defendant McCollum to release her bail money is denied- Govt will relate to defendants pretrial discovery and inspection- Hearing on motion to suppress set down for 3/20/75 at 9:30 A.M.- All motions returnable by 4/4/75 at 2:00 P.M. Trial scheduled for 4/14/75- Pro-se speedy trial motion by defendant Fernandez admitted- decision reserved- The Govt to comply with the defendant COOPER'S request as to discovery and inspection
3/14/75	Financial affidavit filed (GILMORE)
3/14/75	By MISHLER, CH. J. - Order appointing counsel filed (GILMORE)
3-20-75	Before Mishler, Ch J - case called and motion to suppress is added to 4-4-75 at 2:00 PM.
4-2-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed (EVANS, STEWART & FERNANDEZ)
4-2-75	BY MISHLER, CH J - Writs issued as above, ret. 4-11-75.
4-3-75	Notice of Motion filed (Clinton White) for dismissal of the Indictment (ret. 4-18-75)
4-4-75	Before MISHLER, CH J - case called - hearing on motion to suppress held - the following attorneys were present at the hearing : John Corbett for defendant Austin; Alan Scriber for defendant Bryant; Treavor Headley for defendant Cooper; defendant Albert Kreigher for defendant Daniels; Gilbert Epstein for defendant

73 CR 600
CRIMINAL DOCKET

DATE	PROCEEDINGS
11-15-74	Before MISHLER, CH J - Case called - April 14, 1975 for trial; Mar. 14, 1975 for Pre Trial.
11/19/74	Petitions for writ of habeas corpus ad prosequendum filed (STEWART)
11/19/74	By MISHLER, CH.J.- writs issued, ret. 11/29/74 (STEWART and COOPER)
11/29/74	By MISHLER, CH.J.- Order appointing counsel filed (COOPER)
11/29/74	By MISHLER, CH.J.- Order appointing counsel filed (Larry Stewart)
12-29-74	Before Mishler Ch J - case called - adjd to 12-6-74 (for appt of counsel.
XX	
12/6/74	Before MISHLER, CH.J.- Case called- Defts Gilmore & Stewart pres Deft McCallum not present-Adjd to 12/20/74 as to deft Gilmore for assignment of counsel-Bench Warrant ordered for deft McCallum
12/6/74	Bench warrant issued (McCALLUM)
12-12-74	Magistrate's file 74 M 1429 inserted into CR file.
12/20/74	Before MISHLER, CH.J.- Case called- Deft GILMORE and counsel an attorney- Court advised counsel of the pre-trial date and tr.
12/20/74	Notice of appearance filed (GILMORE)
1-3-75	Notice of Motion filed as to deft JOSEPH FERNANDEZ for dismissal of the indictment, etc. (forwarded to Judge Mishler)
1/3/75	Before MISHLER, CH.J.- Case called- Deft BRYANT not present - Ben ant ordered- and execution stayed until 1/10/75 by 9:30 AM.
1/3/75	Letter to chambers from Albert Krieger, esq. filed
1/3/75	Pro-Se Notice of motion to dismiss indictment filed (Joseph Fernandez) ret. 3/14/75
1/10/75	Before MISHLER, CH.J.- Case called- Deft BRYANT and counsel pre Bryant retained Alan Scribner in place of Ivan Fisher
1/10/75	Notice of appearance filed (BRYANT)
1-17-75	Certificate of Engagement filed mailed to attorneys as listed setting case for Pre Trial on Friday, March 14, 1975 and to proceed to trial on April 14, 1975. (Retd to Chambers as direct
1-22-75	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Cooper)
1-22-75	By MISHLER, CH J - Writ Issued, ret. 2-3-75 (Cooper)
2-5-75	Writ retd and filed - Executed (COOPER)
2/7/75	Before MISHLER, CH.J.- Case called- Motion withdrawn by deft Nim the Surety Bond- Deft HAMPTON and counsel present- Bench warren as to deft Hampton- Mr. Winograd relieved as counsel for deft H Court appointed Richard Rosenkranz
2/7/75	By MISHLER, CH.J.- Order appointing-counsel filed (HAMPTON) a/k

DATE	PROCEEDINGS
	Evans; Robert Schmukler for deft Gilmore; Richard Rosenkranz for deft McCallum; Peter Passalacqua for deft Polite; Stephen Flamhaft for deft Stewart; Joanna Seybert Of Legal Aid for deft White; Deft WHITE present in court - Hearing concluded - all briefs on suppression hearing by 4-8-75.
4-7-75	Notice of Motion filed for suppressing evidence(recvd from Chambers) Evans & Daniels.
4-8-75	By MISHLER, CH J - Notice of Appearance and substitution of counsel filed (deft John Bryant)Jeffrey Ullman in place of Alan Scribner. (signed by Judge Mishler on 4-3- but received and filed in Clerks Office on 4-8-75)
4-8-75	By MISHLER, CH J - Order to Show Cause filed as to why all sealed tape recorded conversations made should ^{ret.} not be delivered forthwith for use in forthcoming trial (next xxxxxx 4-10-75) and Affidavit of THOMAS ARMET filed ; together with Govts Memo- randum of Law in support of wiretap etc. filed; with proof ^{of} /service.
4-8-75	Defendant Bryant's Memorandum of Law filed in support of motion to suppress filed.
4-10-75	Defts (John Bryant) supplemental Memorandum of Law on the question of whether the testimony of Donald James is suppressible, etc. filed.
4/11/75	Govt's memorandums in opposition of motions to dismiss filed (4) (WHITE)(AUSTIN)(FERNANDEZ) (DANIELS, EVANS)
4-14-75	Govts Memorandum of Law filed in opposition to motion to suppress evidence obtained under search warrant.
4/14/75	Voucher for compensation of counsel filed (COOPER)
4-14-75	By MISHLER, CH J - Memorandum of Decision and Order filed denying defts motion to suppress evidence(EVANS, DANIELS & JOHN BRYANT)
4-14-75	Before MISHLER, CH J - case called - all defts present with counsels except for defts GATTIS HINTON & FRANK MATTHEWS-trial ordered and BEGUN - Jurors selected and sworn - Trial contd to 4-15-75.
4-14-75	Notice of Appearance filed (MIMS)
4/15/75	Before MISHLER, CH.J.- Case called- Defts and counsel present- except defts HINTON and MATTHEWS- Trial resumed-Trial contd to 4/16/75 at 10:0 A.M.

[Handwritten mark]

DATE.	PROCEEDINGS
4-16-75	Before MISHLER, CH J - case called - all defts present with counsel except defts Hinton & Matthews - Trial resumed - Juror #6 excused by the court with the consent of the defts - motion argued by defts Bryant, Mims, Moore, Polite & White for a mistrial is denied - trial contd to 4-17-75.
4-16-75	Before MISHLER, CH J - case called motion to dismiss argued - also pro se motions by defts DANIELS & EVANS to dismiss - Motions argued and decision reserved.
4-17-75	Before MISHLER, CH.J.- Case called- All defts present with counsel except defts Hinton and Matthews-Trial resumed-Motion by defts Cooper, McCollum, Mims and Moore for severance denied-Motion argued by deft Thrasher for severance denied-Trial contd to 4/21/75 at 10:00 A.M.
4-21-75	Letter filed dated 2-18-75 re deft John Bryant from Jeffrey Illmann, Esq. counsel for deft (received from Chambers and ret'd as requested)
4-21-75	Before MISHLER, CH J - case called - all defts present with counsels except defts HINTON & MATTHEWS - trial resumed - Trial contd to 4-22-75.
4-22-75	Before MISHLER, CH J - case called - all defts present with counsels - except defts HINTON & MATTHEWS - trial resumed and contd until 1:00 P.M. because of the illness of deft AUSTIN - at 1:10 PM the case was adj'd to 4-23-75 at 10:00 AM because deft AUSTIN was in the hospital.
4-23/75	Before MISHLER, CH.J.- Case called- Defts present with counsel except for de Hinton and Mathews-On motion of govt defts Cooper and Polite are severed from trial-Trial resumed at 2:20 P.M.-Trial contd to 4/24/75 at 10:00 A.M.
4-24/75	Before MISHLER, CH.J.- Case called- Defts and counsel present except defts Hinton, Matthews, Cooper and Polite - Trial resumed- Motion by deft Daniels for severance and mistrial denied- Trial contd to 4/25/75 at 10:00 A.M.
4-25/75	Before MISHLER, CH.J.- Case called- Defts and counsel present- except defts Hinton, Matthews, Cooper and Polite- Trial resumed- Trial contd to 4/28/75 at 10:00 A.M.
4-28/75	Writ ret'd and filed- executed (COOPER)
4-28/75	Before MISHLER, CH.J.-Case called- Defts present with counsel except defts Hinton, Matthews, Cooper and Polite-Juror #1 reported ill- trial to be contd on 4/29/75 at 10:00 A.M.
4-29/75	Before MISHLER, CH.J.- Case called- Defts present with counsel except defts Hinton, Matthews, Cooper and Polite-On motion of defts Bryant, Daniels, Evans Fernandez, Gilmore, McCollum, Mims, Stewart, and White for a mistrial is granted defts severed from trial- On consent of defts Moore and Thrasher and govt trial will continue on with 11 jurors-stipulation signed-trial resumed

11

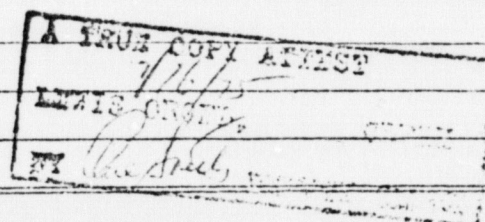
73 CR 600
CRIMINAL DOCKET

DATE	PROCEEDINGS
	Trial as to other defts will begin on 5/5/75 at 10:00 A.M.-Govt Motion by defts Austin, Moore and Thrasher for judgment of acquittal denied-Defts Austin and Thrasher rests-Deft Moore rests-Trial continues 4/30/75 at 10:00 A.M.
4-30-75	Pursuant to Federal Rule Criminal (23(b) consent to continue the trial in this case to verdict with 11 jurors and accept the unanimous verdict of eleven jurors as the verdict filed.Approved by Chief Judge Mishler.(received from Chambers and ret'd as requested)
4/30/75	Before MISHLER, CH.J.- Case called- Defts AUSTIN, MOORE and THRASHER present with counsel-Trial resumed- Govt and deft rests-Motion for judgment of acquittal denied-Application by deft Austin for bail exonerated and to be remanded-motion granted-trial cont'd to 5/1/75 at 10:00 A.M.
5-1-75	Before MISHLER, CH J - case called - defts AUSTIN, MOORE & THRASHER present with counsels - trial resumed - at 11:35 AM the Jury retired for deliberations - at 6:47 PM the jury ret'd and asked to suspend for the day and to return for further deliberations on 5-2-75 at 9:30 am - bail reinstated as to deft AUSTIN and he may be released.
5-1-75	By MISHLER, CH J - Order of sustenance filed.
5-2-75	Before MISHLER, CH J - case called - defts AUSTIN, MOORE & THRASHER present with attys - trial resumed - at 9:30 AM jury continues deliberations - at 3:50 PM jury returned and rendered a verdict guilty on counts 1 and 3 as to deft THRASHER & guilty on count 1 as to deft MOORE. Jury could not reach a verdict as to deft AUSTIN and the court declared a mistrial as to deft AUSTIN - Pre Trial as to deft AUSTIN set down for May 5, 1975 at 10:00 am - Jury polled - jury discharged - trial concluded - sentences adj'd without date as to defts THRASHER & MOORE- all motions reserved until time of sentences.Decision reserved as to Govt's application to increase bail as to defts MOORE & THRASHER - counsel for defts MOORE & THRASHER to appear in court with the defts on May 5, 1975 by 4:00 P.M.
5-2-75	By MISHLER, CH J - Order of sustenance filed (Lunch -13 persons)
5-5-75	Before MISHLER, CH J - case called - defts AUSTIN, BRYANT, DANIEL EVANS, FERNANDEZ, GILMORE, McCALLUM, MIMS, STEWART & WHITE present with attys - deft DANIELS withdraws plea of not guilty and after being advised of his rights by the court and on his own behalf

73 CR 600
CRIMINAL DOCKET

DATE	PROCEEDINGS 16 J
	Trial as to other defts will begin on 5/5/75 at 10:00 A.M.-Govt rests Motion by defts Austin, Moore and Thrasher for judgment of acquittal denied-Defts Austin and Thrasher rests-Deft Moore rests-Trial contd to 4/30/75 at 10:00 A.M.
4-30-75	Pursuant to Federal Rule Criminal (23(b) consent to continue the trial in this case to verdict with 11 jurors and accept the unanimous verdict of eleven jurors as the verdict filed.Approved by Chief Judge Mishler.(received from Chambrs and ret'd as requested)
4/30/75	Before MISHLER, CH.J.- Case called- Defts AUSTIN, MOORE and THRASHER present with counsel-Trial resumed- Govt and deft rests-Motion by defts for judgment of acquittal denied-Application by deft Austin to have his bail exonerated and to be remanded-motion granted-trial contd to 5/1/75 at 10:00 A.M.
5-1-75	Before MISHLER, CH J - case called - defts AUSTIN, MOORE & THRASHER present with counsels - trial resumed - at 11:35 AM the Jury retired for deliberations - at 6:47 PM the jury ret'd and asked to suspend for the day and to return for further deliberations on 5-2-75 at 9:30 am - bail reinstated as to deft AUSTIN and he may be released.
5-1-75	By MISHLER, CH J - Order of sustenance filed.
5-2-75	Before MISHLER, CH J - case called - defts AUSTIN, MOORE & THRASHER present with attys - trial resumed - at 9:30 At jury continues deliberations - at 3:50 PM jury returned and rendered a verdict of guilty on counts 1 and 3 as to deft THRASHER & guilty on count 1 as to deft MOORE. Jury could not reach a verdict as to deft AUSTIN and the court declared a mistrial as to deft AUSTIN - Pre Trial as to deft AUSTIN set down for May 5, 1975 at 10:00 am - Jury polled - jury discharged - trial concluded - sentences adj'd without date as to defts THRASHER & MOORE- all motions reserved until time of sentences.Decision reserved as to Govts application to increase bail as to defts MOORE & THRASHER - counsel for defts MOORE & THRASHER to appear in court with the defts on May 5, 1975 by 4:00 P.M.
5-2-75	By MISHLER, CH J - Order of sustenance filed (Lunch -13 persons)
5-5-75	Before MISHLER, CH J - case called - defts AUSTIN, BRYANT, DANIELS, EVANS, FERNANDEZ, GILMORE, McCALLUM, MIMS STEWART & WHITE present with attys - deft DANIELS withdraws plea of not guilty and after being advised of his rights by the court and on his own behalf

DATE	PROCEEDINGS
	17 K served by the deft- On motion of A.U.S.A. Brewster the remaining are dismissed- Deft WILLIAM MOORE sentenced to imprisonment for period of 10 years- court advised deft of his right to appeal- C motion of A.US.A. Brewster the indictment is dismissed as to de COOPER, FERNANDEZ, NIMS, BRYANT, AUSTIN, POLITE, STEWART, MCCALLUM EVANS
6/20/75	Judgment and Commitment filed - certified copies to Marshal (DANI
6/20/75	Judgment and Commitment filed - certified copies to Marshal (MOOR
6/20/75	By MISHLER, CH.J. - Orders of dismissal filed (COOPER, FERNANDEZ, BRYANT, AUSTIN, POLITE, STWART, MCCALLUM and EVANS)
6-20-75	Before MISHLER, CH J - case called - sentence adjd to June 27, 1975 as to deft RICHARD THRASHER
6/23/75	By MISHLER, CH.J.- Copy of Order filed releasing bail (McCALLUM)
6/27/75	Before MISHLER, CH.J.- Case called- Deft and counsel present- D THRASHER sentenced to imprisonment for a period of 10 years and \$10,000.00 on count 1 and a term of imprisonment of 10 years on 3- said sentences to run concurrently- Court advised deft of hi to appeal- Clerk to filed notice of appeal without fee- bail co
6/27/75	Judgment and Commitment filed- certified copies to Marshal (THRA
6/27/75	Notice of appeal without fee filed (THRASHER)
6/27/75	Docket entries and duplicate of notice of appeal mailed to court appeals
6/27/75	Notice of appeal filed (WILLIAM MOORE)
6/27/75	Docket entries and duplicate of notice of notice of appeal mail court of appeals
6-30-75	Voucher for compensation of counsel filed (POLITE)
7/7/75	Vouchers for compensation of counsel filed (McCOLLOM and FERNANDEZ)
7/7/75	Voucher for compensation of counsel filed (COOPER)
7/9/75	Order received from court of appeals and filed that record be doc on or before 7/16/75 (MOORE and THRASHER)
7/11/75	75 M 1082 is inserted in CR file.



1 Exhibit 3 for Identification.

2 (So marked.)

3 THE COURT: All right, seat the Jury.

4 (Jury present.)

5 THE COURT: Good morning, ladies and gentlemen.

6 We have reached that point in the trial where
7 it becomes my duty to instruct you on the applicable
8 law.

9 Placed on each chair this morning was a
10 document described Memorandum of Verdict, because
11 I don't know any other way of describing it. It has
12 no place of official procedure in the Court.

13 I have Count One and Count Three on this
14 sheet and it is in no way intended to fully describe
15 the charge or the elements necessary.

16 You will see that I have a date January 17,
17 1973, and in parenthesis I have May 1, 1971, and I
18 will explain the reason for that later.

19 We had a change in the law that I will more
20 fully describe when the law under which these defend-
21 ants are charged expired as of April 30th and a new
22 law went into effect.

23 The Government must prove that all the elements
24 of the crime charged or committed were performed be-
25 fore May 1, 1971, even though the conspiracy charged

Charge of the Court

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1 goes to January 17, 1973.

2
3 So I say this is just a brief description of
4 the charge, the nub of it. It is intended to emphasize
5 to you that each defendant is being tried separately.

6 You must measure the evidence against each
7 defendant separately. I think that it is important
8 that we all understand what everyone who is involved
9 in a criminal trial does or is expected to do or
10 is obligated to do.

11 We understand that litigants, the litigants
12 are the Government of the United States, the defendants.
13 Billy Austin, William Moore and Richard Thrasher,
14 they all are on the same footing in this Court. No
15 one stands taller than anyone else in this Courtroom.

16 The mere fact that the United States of America
17 is a party should mean to you only that the
18 United States of America has certain obligations in
19 a criminal trial and the defendants have certain
20 rights.

21 You must understand what the obligations are
22 and you must understand what the defendants' rights
23 are.

24 One of the lawyers in summation said they all
25 stand on the same footing, the same level, the flat,

Charge of the Court

2078

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2 he called it, and I do not care which way you think
3 of it, I just think that they are all of the same size
4 figuratively in this Court. We have no favorites.

5 Then there are the lawyers, they represent
6 their clients' interest, and it is good that in that
7 representation, they represent their clients' interest
8 zealously and vigorously.

9 Mr. Fisher saw fit to apologize at one point
10 in his summation for his loud voice. He even apologized
11 for his size, but that is just his manner of repre-
12 senting a client.

13 I think all the lawyers in this case behaved
14 admirably, in the finest tradition of the Bar. I
15 think they did a fine job for their clients. That
16 is the way it should be.

17 This is an adversary proceeding. It is not
18 always that all the defendants agreed with each other,
19 though I recognize or remember no conflict among
20 them, but there certainly is a difference of opinion
21 between the Government and the defendants. Each one
22 takes a side of an important issue in this case.

23 The important issue, as you will later learn,
24 and I will more fully explain, is that these defendants,
25 Billy Austin, William Moore and Richard Thrasher,

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2 the Government claims supplied narcotics to James
3 and Daniels and in effect, the Government says "We proved
4 that by proof beyond a reasonable doubt," and on
5 the other side, there is an attack on that position
6 by the defendants, and they say "It has not been
7 proved," and they are adversaries on that issue as
8 well as others. But that is the crucial issue in
9 the case.

10 This is called an adversary proceeding, so
11 the lawyers are here to develop the evidence that
12 is relevant or pertinent to the issue and they have
13 done a fine job, as I have said.

14 The evidence is there and it is there developed
15 for the Jury.

16 What is the Jury's function?

17 Well, the Jury, as the Court, is a judge.
18 The Jury is the judge of the facts. The Court, the
19 judge of the law. The Court and Jury, as distinguished
20 from the lawyers, are impartial, objective, dispassion-
21 ate.

22 The lawyers, because of their relationship,
23 couldn't be objective, try as they might. They
24 represent a particular point of view.

25 The Court and Jury represents neither side,

Charge of the Court

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1
2 neither point of view.

3 The Court and Jury represent neither side,
4 neither point of view. The Jury is to deal with
5 the evidence. The Court is to deal with the law.

6 A Jury trial works best, and by best, I mean
7 fairness, when each participant in the trial under-
8 stands and recognizes its own power and authority,
9 its own obligations and also the obligations, the
10 power and authority of all the other participants in
11 the trial.

12 So, as between the Court and Jury, you must
13 accept the law as the Court charges it. You may
14 disagree with some of the principles of law. You
15 may disagree with the statutory law as I read it.
16 You may not like it. But it is not for you to like.
17 I charge it, I hope and I believe, objectively with-
18 out favor, because I believe it is the law and not
19 because I like it or dislike it.

20 You must accept it in that spirit, judging
21 the facts, which means in effect finding the facts,
22 finding out what happened on the disputed issues
23 in this case, applying the law as I charge it. You
24 will then come to the ultimate decision in this case
25 as to the guilt or innocence of each of the defendants

Charge of the Court

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charged.

At the outset, I must comment on what one of the lawyers said in summation, and wide latitude is generally given to lawyers to comment on the evidence. But one lawyer said that Donald James and Nancy Marbury were on trial.

Well, if he meant in a sense that the Government's case rested on those witnesses, I would agree with him. But the statement standing alone is not accurate because the defendants on trial are the defendants I just named.

In every criminal case, an accused, a defendant, is presumed to be innocent.

In my charge, at times I will use "defendant" or "defendants," but even if I use the singular, I mean it as a group, collectively. I mean all three. It applies to all three defendants.

If I want to single out any particular defendant for a particular charge, then I will name the defendant.

So, when I say a defendant is presumed to be innocent, that means all three defendants are presumed to be innocent.

The presumption of innocence is a time-honored

Charge of the Court

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presumption in Anglo-American law. It means that each defendant is presumed to be innocent of the charge in Count One and the defendant Thrasher is presumed to be innocent of the charge in Count Three.

It means that at the very outset of the trial, you must conclude that the defendants are innocent of the crimes charged. That presumption remains throughout the trial and throughout your deliberations. That presumption is enough to acquit a defendant.

You may find a defendant guilty of the crime charged only if the Government overcomes that presumption by proof beyond a reasonable doubt.

What is a reasonable doubt?

A reasonable doubt is a doubt which a reasonable person would have after weighing all of the evidence. It is a doubt based on reason and common sense, a doubt based on your experience rather than a doubt based on speculation or emotion. It is not a vague or imaginary doubt.

A reasonable doubt is a kind of doubt that would make a reasonable person hesitate to act in a matter of importance in his own life.

Proof beyond a reasonable doubt is therefore proof of such a convincing character that you will

Charge of the Court

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2 be willing to rely and act upon it unhesitatingly
3 in the most important of your own affairs.

4 The Government's burden is not to prove the
5 guilt of the defendant beyond all possible doubt.
6 There is a qualifying adjective. The Government's
7 burden is to prove the guilt of the defendant beyond
8 a reasonable doubt. The Government's burden is
9 not to prove that every bit of evidence offered in
10 the trial is true beyond a reasonable doubt. The
11 Government's burden, heavy as it is, is to prove
12 every essential element of the crime charged beyond
13 a reasonable doubt, and later in the charge I will
14 charge you on what the essential elements of the crime
15 of conspiracy are, and the crime against the defend-
16 ant Thrasher, in Count Three, on concealing, buying,
17 receiving, selling and transporting heroin on April 9,
18 1971.

19 Reasonable doubt may arise from the failure
20 of the Government to produce evidence. The defendants
21 do not have to prove their innocence. On the contrary,
22 they are presumed to be innocent of the charges con-
23 tained in the indictment and they may rely on the
24 failure of the Government to prove their guilt.

25 The weight of the evidence is not necessarily

Charge of the Court

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determined by the number of witnesses testifying on either side. You should consider all of the facts and circumstances, and Judge it on the quality of the evidence offered.

Evidence is the method that the law uses to prove or disprove a disputed fact.

There are two general classifications of evidence, one is direct evidence and the other is circumstantial evidence.

(Continued on next page.)

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2 THE COURT: (Cont'g.) Direct evidence is the
3 testimony of witnesses as to what a witness saw or
4 heard. Circumstantial evidence is a method of proving
5 a disputed fact by drawing inferences based on good
6 common sense and experience to arrive at the ultimate
7 fact.

8 The example which I usually give, I think, is
9 more instructive than the abstract definition. If you
10 were sitting here as a juror in a civil case and let us
11 assume that the plaintiff A, sued the defendant, B,
12 for personal injuries claiming that the defendant, B,
13 passed a stop sign without stopping and then struck
14 the plaintiff, A:

15 Let us assume that the circumstances were that
16 my courtroom deputy and myself were standing on the
17 on the street corner where the stop sign was erected.
18 If he were called to testify, let us assume that he
19 was facing the roadway and I, on the other hand, had
20 my back to the stop sign.

21 Now, the first step in the procedure is to
22 identify the disputed issue. You must remember the
23 plaintiff says the defendant driving his car drove
24 past the stop sign without stopping.

25 The defendant, in effect, says "No, I stopped

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2 at the stop sign and then proceeded." Well, as I
3 say, if Mr. Adler were facing the stop sign, he might
4 testify that the 1975 white Cadillac was driving down
5 the roadway and he was talking with me and through or
6 within the range of his peripheral vision, he noticed
7 the white Cadillac driving at 65 miles an hour, saw
8 it proceed to the stop sign and passed the stop sign
9 and struck the plaintiff.

10 Now, that's direct testimony when the defend-
11 ant passed the stop sign without stopping. If I
12 were called as a witness, I could testify as to the
13 circumstances, but I couldn't testify that the car
14 passed the stop sign without stopping.

15 I might say as I was speaking with Mr. Adler,
16 my courtroom deputy, the '75 Cadillac caught my eye
17 and I saw it coming down at 65 miles an hour, it
18 passed behind me and about 75 or 100 feet later and
19 about two or three seconds later, I saw it strike the
20 plaintiff and cause the injuries.

21 Now, the circumstances based on my testimony
22 alone would be that the motor vehicle traveling at
23 about 65 miles an hour traversed 75 or 100 feet that
24 I couldn't see and when I saw it again, two or three
25 seconds had transpired and I think that based on those
circumstances, your experi

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2 circumstances, your experience and good common sense
3 would tell you that that motor vehicle passed the stop
4 sign without stopping.

5 It's obvious that had it stopped, it would have
6 taken a few seconds to start up again and go, so through
7 your mental processes you would arrive at that reason-
8 able inference.

9 So, there the same disputed fact is proved by
10 both the direct and the circumstantial evidence. The
11 law doesn't hold that one type of evidence is of
12 better quality than the other. In some cases, direct
13 testimony is better. In some cases, circumstantial
14 evidence is better.

15 The law requires that both on the direct evi-
16 dence and the circumstantial evidence, the government
17 prove the guilt of the defendant beyond a reasonable
18 doubt.

19 What is the evidence in this case? You must
20 decide this case solely on the evidence that is adduced
21 within the four walls of this courtroom, and the fair
22 and reasonable inferences, based on your good common
23 sense and experience to be drawn from the established
24 facts.

25 First, there is the sworn testimony of the

1 witnesses, regardless of who may of called them. Then
2 it is the exhibits received in evidence and in this
3 case that includes the wiretapes. Then there are
4 facts which may have been admitted or stipulated to
5 between the parties. That is the evidence in the
6 case.
7

8 On that you you will make your determination
9 in accordance with the law as I charge it. It might
10 be helpful to point out matters that are not evidence
11 in the case, not the testimony, not the basis for your
12 decision.

13 We start with the opening statements and then the
14 closing statements of counsel. In opening, they des-
15 cribe their positions and the purpose was to make it
16 easier for the jury to follow the testimony.

17 In summations, they argued the testimony to
18 you. That was for the purpose of focusing your atten-
19 tion on the evidence that they believed was important
20 to the issues. The defendants argue theories of
21 exculpability. In effect they said the government
22 failed to prove the guilt of these defendants and you
23 must acquit.

24 The government, on the other hand, argued
25 theories of inculpability, of guilt. Mr. Caden argued

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2 that the government proved its case beyond a reason-
3 able doubt.

4 The opening and summations were valuable tools
5 to help you arrive at the truth, but they were not
6 evidence. Any statement by the Court is not evidence.
7 Any questions the Court put, you should not attach
8 any special evidence to them.

9 If I happened to ask a question and I did it
10 infrequently, it was only because at the moment I felt
11 a little confused about some testimony and so I thought
12 that if I was, it might be that you were too, and I
13 had hoped that the questioning would clear it up and
14 that was the only purpose.

15 At times, answers were stricken from the record.
16 As I directed the Reporter to strike it from his record,
17 so I directed you to disregard it and figuratively
18 striking it from your mind and your consideration.

19 At times, objection was sustained to questions
20 asked by a lawyer. Now, you may not speculate on
21 what the answers might have been had the witness be
22 permitted to answer. On this same theory, the witness
23 did not answer. The question standing alone is not
24 testimony. It is not in the record, so you may not
25 consider it.

At times during the trial the lawyer incorporated a fact which had no basis in the record and the witness said, no, and rejected it. If the witness rejected it, you have no reason to believe that that fact is true and you may not consider it as part of the record.

You, the jurors are the sole judges of the credibility of the witnesses, which means the believability of their testimony and the weight their testimony deserves.

Scrutinize the testimony given and the circumstances under which each witness testified and in every manner of evidence which tends to show whether a witness is worthy of belief.

(Continued on next page.)

Charge of the Court

HS:jm
T2amR1

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2 THE COURT (continuing): Consider the
3 witness' intelligence. Consider his motive, which
4 means consider why he is testifying and consider
5 his state of mind while on the witness chair before
6 you. Consider his demeanor and manner while
7 answering questions. In other words, did he give
8 you the impression that he was fully truthful with
9 you? Was he evasive? Consider the witness' own
10 ability to observe the matters as to which he has
11 testified, whether he shall have impressed you as
12 having an accurate recollection of those matters.

13 You'll recall on cross-examination at times
14 the witness was directed to answer yes or no and I
15 told you the reason for it. The cross-examiner has
16 the right to control the cross-examination. At times
17 it is difficult in examining or thinking about a
18 question to answer yes or no. There is an inclination
19 to want to explain. Take that under consideration.
20 Take into consideration the relation that each
21 witness might bear to either side of the case, the
22 manner in which each witness might be affected by the
23 verdict, the extent to which at all the witness'
24 testimony is contradicted or corroborated by other
25 testimony or evidence in the case. If a witness is

Charge of the Court

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2 shown to have knowingly testified falsely under
3 oath concerning a material matter, you have the
2 4 right to distrust all the testimony that that witness
5 gave on the theory that the witness is unworthy of
6 belief or, on the other hand, you may, after you
7 reject the testimony you recognize as false, accept
8 a portion or all the rest of the testimony that you
9 feel is believable. That principle simply under-
10 scores the wide discretion the jury has in weighing
11 the credibility, the believability of the testimony
12 of witnesses who testify before you.

13 The law does not compel a defendant in a
14 criminal case to take the witness stand and testify.
15 No presumption of guilt may be raised and no
16 unfavorable inference of any kind may be drawn in
17 the failure of a defendant to testify. A defendant,
18 as previously charged, may rely on the failure of
19 the Government to prove its case. It would be
20 improper for you to discuss the failure of a witness
21 to testify at any time and during your deliberations.

22 In this case, Donald James and Nancy Marbury
23 said that they participated in the conspiracy charged
24 in the indictment and Donald James testified that he
25 participated in the sale of the heroin on

Charge of the Court

3 2 April 9th, 1971. Where one participates in a crime
3 3 charged, he becomes an accomplice. An alleged
4 4 accomplice does not become incompetent to testify
5 5 because of participation in the crime charged. On
6 6 the contrary, the testimony of an alleged accomplice
7 7 alone, if believed by the jury to be true beyond a
8 8 reasonable doubt, may be of sufficient weight to
9 9 sustain a verdict of guilty, even though not
10 10 corroborated or supported by other evidence.

11 However, the jury should keep in mind that
12 12 such testimony is also to be received with caution
13 13 and weighed with great care. You should never
14 14 convict a defendant upon the unsupported testimony of
15 15 an alleged accomplice, unless you believe such
16 16 testimony to be true beyond a reasonable doubt. The
17 17 testimony of an informer who provides evidence
18 18 against a defendant for pay or for immunity from
19 19 punishment or personal advantage or vindication, must
20 20 be examined and weighed by the jury with greater
21 21 care than the testimony of an ordinary witness. The
22 22 jury must determine whether the informant's testimony
23 23 has been affected by interest or by prejudice against
24 24 a defendant and the extent of such interest or
25 25 prejudice. The testimony of a witness may be

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During this trial the defendants' cross-examination consisted in part of confronting the Government's witnesses with prior statements which the defendants claim in their summation were inconsistent with the testimony given before you. At times defendants' counsel pointed to the failure of the witness to give testimony prior to the time he or she took the witness stand, when it was reasonable to expect that he or she would do so. Now, evidence that at some time prior to the time the witness took the stand to testify that witness said or did something which is inconsistent with the witness' testimony during the trial may be considered by the jury for the purpose of judging the credibility

Charge of the Court

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2 2 of the witness, if adopted by the witness. That is,
3 3 if the witness admitted before you that he made the
4 4 prior statement that is inconsistent with his
5 5 testimony or her testimony, it may also be used as
6 6 affirmative evidence in the case.

7 7 Now, there are times that you recognize that
8 8 telling a variation of an act or transaction a second
9 9 time is different than the first time. There are
10 10 times when you recognize that different people of
11 11 integrity and truthfulness ing the same event
12 12 might see it differently. Those are normal
13 13 variations. I would think that if a witness repeated
14 14 what was said before word for word, pause for pause,
15 15 gesture for gesture, you'd suspect that testimony.
16 16 You would feel that it was just a story that he or
17 17 she was telling, that it was rehearsed. So in
18 18 evaluating the prior statements and in making a
19 19 determination as to how it affects a witness'
20 20 testimony, you must first determine whether it is
21 21 just a normal variation or whether it is an
22 22 inconsistent statement. If you find it is an
23 23 inconsistent statement, will determine whether it
24 24 is inconsistent as to a material matter or as to a
25 25 material issue -- whether it is material or

Charge of the Court

immaterial -- and then you determine the effect that the prior inconsistent statement should have on the credibility of the witness.

We now come to the charge or charges in the indictment. The Congress determines what is a crime. It is all based on statute. Congress passes a bill and the President signs it. Most of the Federal law is codified. It is put into books under title for easy reference. The charge upon which this indictment is based or, rather, statute upon which this indictment is based is 21, United States Code Sections 173 and 174. Title 21 is just "Food and Drugs." This statute was in effect for many years and in 1970 the Congress passed a law known as the "Drug Abuse and Control Act of 1970", which became effective May 1, 1971. The statute that I am about to read to you was the law until and including April 30th, 1971. The Congress in its wisdom saw fit to strictly control the importation, transportation, sale, manufacture and distribution of narcotic drugs, so in Section 173 of Title 21, the Congress in effect said:

No opium or opium derivative, which includes heroin, may be imported into the United States except

Charge of the Court

for very specific medicinal and experimental purposes , and it said it in this language:

I will just read the pertinent part:

"It is unlawful to import or bring any narcotic drug into the United States or any territory under its control, except such amounts of crude opium as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses", and so forth.

That effectively barred the importation of heroin, except for those very narrow purposes.

Section 174 made it a crime to import or otherwise deal in heroin. It said it in this language:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law ..."

I will hesitate because that is what we call

1 Charge of the Court

2 the substantive acts. The Congress said, "Don't
3 import, don't receive, don't conceal, don't buy,
4 don't sell", and if you do it is a crime.

8 5 Now the next phrase is the conspiracy portion
6 of that statute. It is very brief, but that is the
7 phrase upon which count one is based:

8 "... or conspires to commit any of such acts
9 in violation of the laws of the United States,
10 commits a crime."

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13 (continued on next page)
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Charge of the Court

Now, there is one other paragraph that I will refer to later, but I will read now. I may read it a second time, but I do not want to forget it.

It says: "Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of a narcotics drug, such possession shall deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Just keep that last paragraph in mind and I will refer to it later.

Now, I charge you that heroin hydrochloride is a narcotic drug.

I will now go to the indictment. I will read both charges. Again I remind you that the indictment is not proof of the statements or allegations made in the counts of the indictments. It is just the manner in which the law brings a defendant into court to answer the charges, nothing more, and these defendants have said "Not guilty." The defendant Moore and the defendant Austin have said "Not guilty" to count 1 and the defendant Thrasher has said "Not guilty" to counts 1 and 3.

Now you recognize that others were charged in

1 the indictment and you saw that some was severed and
2 you should not be concerned with any that were
3 severed. Again I say your concern is the guilt or
4 innocence of those before you, but I will read the
5 entire indictment in its original form.

6 Count 1 charges:

7 From on or about the 1st day of June 1970 up
8 to and including the 17th day of January 1973, both
9 dates being approximate and inclusive, within the
10 Eastern District of New York, and elsewhere, the
11 defendants Billy Austin, John Bryant, Alvin Cooper,
12 Robert Ray Daniels, a/k/a "Dutch", Harriet Evans,
13 a/k/a as "Harriet Clark", Joseph Fernandez, a/k/a as
14 "Slim", Walter Gilmore, G/ttis Hinton, Frank Matthews,
15 Bonnie McCallum, Gerald Mins, a/k/a "Pop", William
16 Moore, a/k/a "B.I.", Joseph Polite, a/k/a "Junior",
17 Larry Stewart, Richard Thrasher, Clinton White,
18 a/k/a "Angel", together with Donald James, named
19 herein as a co-conspirator but not as a co-defendant,
20 and others known and unknown to the Grand Jury,
21 unlawfully, wilfully and knowingly did combine,
22 conspire, confederate and agree together and with each
23 other to violate prior to May 1, 1971, Sections 173
24 and 174 of Title 21, United States Code.

25 "(1) It was part of said conspiracy that prior

1 to May 1, 1971 the defendants unlawfully, wilfully
2 and knowingly would receive, conceal, buy, sell and
3 facilitate the transportation, concealment and sale
4 of large amounts of heroin, a narcotic drug, after
5 such narcotic drug had been imported and brought into
6 the United States, knowing the same to have been
7 imported and brought into the United States contrary
8 to law."

9 2 is irrelevant here.

10 "(3) It was further a part of said conspiracy
11 that the defendants would conceal the existence of
12 the conspiracy and would take steps designed to
13 prevent disclosure of their activities.

14 "In furtherance of the conspiracy and to
15 effect the objects, thereof, the following overt acts,
16 among others, were committed within the Eastern
17 District and elsewhere:

18 "(1) In or about December 1970, in the
19 vicinity of Tapscott Street and Dumond Avenue,
20 Brooklyn, New York, the defendant Frank Matthews met
21 with the defendant Robert Ray Daniels, a/k/a "Dutch"
22 and the defendant Harriett Evans, a/k/a "Harriet Clark".

23 "(2) On or about April 9, 1971, in Brownie's
24 Bar on St. Marks Avenue, Brooklyn, New York, the
25 defendant Richard Thrasher met with Donald James,
named herein as a co-conspirator but not as a

1 defendant.

2 "(3) In or about October 1970, in the
3 vicinity of Montgomery Street and Rogers Avenue,
4 Brooklyn, New York, the defendant William Moore,
5 a/k/a "B.I." met Donald James, named herein as a co-
6 conspirator but not as a defendant."

7 Do any of the attorneys want me to read the
8 other overt acts?

9 MR. FISHER: No, your Honor.

10 MR. CORBETT: No, sir.

11 MR. CADEN: No, your Honor.

12 THE COURT: All right.

13 "Count 3 charges on or about the 9th day of
14 April 1971, within the Eastern District of New York,
15 the defendant Robert Ray Daniels, a/k/a as "Dutch",
16 and the defendant Richard Thrasher did receive,
17 conceal, sell and facilitate the transportation,
18 concealment and sale of approximately 150.04 grams
19 of heroin hydrochloride, a narcotic drugs, after it
20 had been imported and brought into the United States,
21 knowing the same to have been imported and brought
22 into the United States contrary to law."

23 Count 3 charges the defendant Thrasher with
24 what we call the substantive crime, the actual act of
25 receiving, concealing, selling and facilitating the

1 concealment and sale of the heroin.

2 Count 1 on the other hand charges the
3 conspiracy to perform the various acts in violation
4 of the Federal Drug laws.

5 In other words, count 1 is the conspiracy
6 charge. The phrase in 174 which I read makes the
7 conspiracy to perform these unlawful acts a separate
8 crime. It is the agreement, the getting together,
9 the joint venture, if you will, the partnership that
10 the law condemns.

11 What is a conspiracy? A conspiracy is a
12 combination of two or more persons organized to
13 accomplish some unlawful purpose and in this case the
14 unlawful purpose was to deal in heroin. A conspiracy
15 has been described as a partnership in criminal
16 purposes in which each member of the partnership
17 becomes the agent of every other member of the partner-
18 ship for matters dealing with partnership business.

19 Members of the conspiracy are called
20 "conspirators" or "co-conspirators." The mere
21 similarity in conduct of various persons and the fact
22 that they have been associated with each other and
23 may have assembled together and discussed common
24 names and interests does not necessarily establish
25 proof of the existence of the conspiracy. The mere

Charge of the Court

1
2 association of an accused with someone that you find
3 was a member of the conspiracy is not enough to bring
4 an accused into the conspiracy. The mere presence
5 of an accused at a time and place where the activities
6 of the unlawful conspiracy are being conducted is not
7 enough. The Government must prove beyond a reasonable
8 doubt the knowing and voluntary participation in
9 the conspiracy. That means the Government must
10 prove that the accused knew the business of the
11 conspiracy and did something to participate in the
12 conspiratorial business to promote its activities.

13 One may innocently participate in advance in
14 the purposes of the conspiracy. If A were driving
15 a car along the roadway and B hailed him and B had
16 heroin in his pocket for delivery to a customer and
17 A took B in his car and drove him along not knowing
18 that he was advancing the purpose of the conspiracy,
19 that would not make A a conspirator. It wasn't
20 known. He wasn't aware that it was part of the
21 business, so what he was doing -- even though it
22 advanced the business -- didn't make him a knowing
23 participant in the business.

24 However, the evidence in the case need not
25 show that all the parties sat down and agreed to any

Charge of the Court

1 formal agreement. The agreement need not be
2 expressed. In that respect it probably differs
3 from a lawful partnership where usually, not always
4 there either, but usually there are written agree-
5 ments, written documents and it is more or less
6 formal.
7

8 What the evidence in the case must show beyond
9 a reasonable doubt in order to establish that a
10 conspiracy existed, is that the members in some way
11 or some manner or through some contrivance positively
12 or tacitly came to a mutual understanding to try
13 to accomplish the common and unlawful plan which
14 again in this case was dealing in heroin. The
15 proof need not show that all the means and all the
16 methods set forth in the indictment were agreed upon
17 or even that all the means were put into operation
18 in order that all the persons that were charged were
19 members of the conspiracy. What the evidence in
20 the case must establish beyond a reasonable doubt is
21 that the alleged conspiracy was knowingly formed.

22 In other words, those individuals who became
23 members of the conspiracy knew and understood what
24 it was organized for, the purpose of dealing in
25 heroin, and that one or more of the means, or methods

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described in the indictment were agreed upon and used in an effort to accomplish the purpose of the conspiracy as charged in the indictment, and that two or more persons -- including one or more of the accused -- were knowing members of the conspiracy.

One may become a member of the conspiracy without knowing all the details and without knowing the structure of the conspiracy.

Again on the other hand, if someone just happens to further the purpose of the conspiracy without knowing that he is in fact furthering the business of the conspiracy, he does not become a member of that conspiracy. In order to bring an accused into the conspiracy -- in other words, to find him to be a member of the conspiracy the Government must prove beyond a reasonable doubt that the accused acted or participated knowingly and wilfully.

In other words, was aware of the business of the conspiracy, knew that it was to deal in heroin and entered the wilfully, which means voluntarily and intentionally, knowing that it was a violation of law to take part in any such venture.

(Cont'd on next page.)

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2 THE COURT: (Cont'g.) We talk about the conspi-
3 racy as being like a partnership. You heard me say
4 that during the trial. You may have some difficulty
5 dealing with the concept if you think of it as being
6 an equal partnership, where everone does the same kind
7 of work and shares equally.

8 As a matter of fact, not all lawful partner-
9 ships are equal partnerships in which everyone performs
10 the same kind of work and shares equally in the pro-
11 fits. In this case, it is the theory of the govern-
12 ment that the conspiracy was a chain conspiracy. That
13 means that various members of the conspiracy performed
14 different roles. They performed on different functional
15 levels.

16 As I understand it, the claim is that Frank
17 Matthews and the defendants Billy Austin, William Moore
18 and Richard Thrasher were suppliers to Donald James
19 and Robert Ray Daniels and that Robert Ray Daniels
20 and Donald James had various lieutenants.

21 As I recall it, Bryant, Cooper, Fernandez,
22 Gilmore, Polite, Stewart and White. That there was
23 an answering service or an order taker and that was
24 Charlie Brown and Carol Brown, his wife; and that
25 later Evans performed the services of a bookkeeper

1
2 and that there were workers in the street that sold
3 to users.

4 These workers at times or at a time numbered
5 as many as 100 and among the workers were Bonnie
6 McCallum and Gerald Mims.

7 Now, it is not necessary for the government to
8 prove that these accused knew all the other workers
9 or any of the workers. It is necessary for the govern-
10 ment to prove beyond a reasonable doubt that these
11 defendants as suppliers were aware that the success
12 of their portion of the conspiracy depended on the
13 effort of others in the conspiracy, on the efforts
14 of Donald James and Robert Ray Daniels, to dispose
15 of the heroin that they supplied and in turn on the
16 efforts of the workers to dispose of the heroin that
17 they in turn received, to the users.

18 And that they were aware that there were others
19 in various levels of performance and that success in
20 the performance by the various people at various levels
21 were necessary to the success of their own operation.

22 I charged you on an evidentiary matter and that
23 was when you would treat statements made by the one
24 conspirator outside the presence of the accused. I
25 told you that under certain circumstances, you could

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treat those statements, even though not made by or in the presence of any accused, as evidence against an accused.

Whenever it appears beyond a reasonable doubt from the evidence in the case that a conspiracy existed and that an accused was one of the members, then the statements thereafter knowingly made and the acts thereafter knowingly done by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the accused, found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the defendant, provided such statements and acts were knowingly made and done during the term of the conspiracy and in furtherance of some object or purpose of the conspiracy.

Otherwise, any admission or incriminatory act made or act done outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made or saw the act done.

The government must prove the following three essential elements in order to establish the crime of conspiracy as charged in the indictment.

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2 First, that the conspiracy described in the
3 indictment was knowingly and wilfully and was existing
4 at or about the time alleged for the purpose set forth,
5 to wit, to deal in heroin.

6 Two, that the accused wilfully became a member
7 of the conspiracy. That means the government must
8 prove that the accused knew that the conspiracy was
9 dealing in heroin and entered it voluntarily and
10 intentionally, knowing that it was a violation of law.
11 The government must also prove that the heroin was
12 imported and that the accused knew that the heroin
13 was imported and here in a few moments I will come
14 back to that -- what I call the statutory inference,
15 the paragraph I read under 174. There the government
16 is aided by a statutory inference.

17 But in order for the government to prove that
18 an accused knowingly and wilfully entered the conspi-
19 racy, it must be on the proof by testimony of a wit-
20 ness as to what that witness saw or heard the accused
21 say or do.

22 The third essential element is that one of the
23 conspirators thereafter knowingly committed an overt
24 act in furtherance of the objects and purposes of the
25 conspiracy.

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1 The government must prove all those essential
2 elements by proof beyond a reasonable doubt before you
3 may convict the accused. If the government has failed,
4 then you must find the accused not guilty.
5

6 If the government has proved all those essential
7 elements, beyond a reasonable doubt, then you have
8 the obligation of finding the defendant guilty.

9 Count 3, again, charges only the defendant
10 Thrasher. The government must prove the following
11 essential elements of that crime charged. One, that
12 on or about April 9, 1971, the defendant Richard
13 Thrasher received, concealed, sold and facilitated
14 the transportation, concealment and sale of approxi-
15 mately 150.4 grams of heroin, as alleged, which heroin
16 will be imported or brought into the United States of
17 America contrary to law as charged.

18 Two, the acts were performed with the knowledge
19 that heroin will be imported or brought into the
20 United States contrary to law as charged.

21 Three, that Richard Thrasher performed the acts
22 knowingly and unlawfully. In other words, that he
23 knew that the package that the government alleges he
24 delivered in the bathroom at Brownie's to James was
25 heroin.

1
2 As I say, an act is done knowingly if done
3 voluntarily and intentionally and not done because of
4 mistake or accident. An act is done wilfully if done
5 voluntarily and intentionally and with specific intent
6 to violate the law.

7 Coming back to the statutory inference in 174,
8 you understand the government must prove that the
9 heroin was imported and that is really referring to
10 Count 3. In Count 1, on the agreement the government
11 must prove that the parties entered into the agreement
12 intending to deal in heroin that was imported and that
13 the government must prove in both counts that not only
14 that it was imported but that the accused knew that
15 it was imported.

16 First, Count 3: And knew that they had agreed
17 to deal in imported heroin. Again, I will repeat this:
18 Whenever on trial for violation of this section, the
19 defendant is shown to have or to have had possession
20 of the narcotic drug, such possession shall be deemed
21 sufficient evidence to authorize the conviction unless
22 the defendant explains the possession to the satis-
23 faction of the jury.

24 If the government proves beyond a reasonable
25 doubt that a defendant was in possession of heroin as

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1 far as the Count 1 is concerned, it would be during
2 the term of the conspiracy or limited as it is by what
3 I told you, about the effectiveness of this statute at
4 anytime up to April 30, 1971 and that the defendant
5 knew that the substance that he or she possessed was
6 heroin, then the fact of knowing possession alone,
7 proof beyond a reasonable doubt of knowing possession
8 on the part of any accused, unless explained to the
9 satisfaction of the jury by the evidence in the case,
10 permits the jury but does not require the jury, to
11 draw an inference and find that the heroin was imported
12 or brought into the United States contrary to law,
13 and two, that the accused knew that the heroin was
14 imported or brought into the United States contrary
15 to law.
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18 (Continued on next page.)
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CHARGE OF THE COURT

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2 THE COURT: (Cont'g.) I should distinguish
3 between an inference and a conclusion which the jury
4 may draw, based on experience and good common sense.
5 The example of that, of course, is the method through
6 which a disputed fact is proved through circumstantial
7 evidence. A presumption, on the other hand, is a con-
8 clusion which the jury must accept and is overcome only
9 if proof beyond a reasonable doubt to the contrary is
10 shown.

11 The example of that, of course, is the presump-
12 tion of innocence. This permissible statutory inference,
13 of course, is not binding upon you and you may refuse
14 to draw that inference.

15 It is the government's burden to prove beyond
16 a reasonable doubt that the accused against whom the
17 inference may be drawn possessed the heroin. That
18 defendant is under no burden to explain it. You may
19 find the explanation in the record itself.

20 You are again reminded that the defendant has
21 a constitutional right not to testify. The basis for
22 the inference as it relates to heroin is supported
23 by findings of various commissions on law enforcement.
24 One of them is the Presidential Commission on Law Enforce-
25 ment and Administration of Justice, in its 1967 report

and the U.N. Commission on Narcotic Drugs Report of the 18th Session, in 1963, which found that all the heroin which reaches the American user is smuggled into the country from abroad.

Again, you may not draw any unfavorable inference because of the defendant's failure to testify. He has a constitutional right to do this and it would be improper for you to draw such an inference.

Specifically, on the subject matter that I am talking about on the knowing possession of heroin in the manner in which I have instructed you, the defendant's failure to testify concerning the circumstances should not be held against him.

You look through the record and see if there is an explanation there. We talked about possession and we talked about one conspirator being the agent for another conspirator who you find to be a member of the conspiracy. It doesn't apply to possession. Here because the knowing possession is so directly tied to guilt, that possession is personal.

In other words, the possession of heroin by Donald James or by Nancy Marbury cannot be attributed to any of the accused for the purpose of drawing the statutory inference. If you are to draw the inference,

1
2 it must be based on the finding that the accused him-
3 self had the heroin, possessed it, had it under his
4 control.

5 I am about to excuse you from the courtroom
6 but before I do, I want to again remind you that you
7 have a duty to sift through the evidence. Based on
8 the evidence, make your finding.

9 Having made a fact finding, in other words,
10 found out, made a determination as to what happened,
11 then apply the law as I have charged it. Each juror
12 must decide for himself. In other words, this is in
13 effect, eleven verdicts; when all eleven agree, it be-
14 comes the verdict of the case.

15 It would be improper for any juror to abandon
16 that obligation, to say, in effect, "Well, I'll go
17 along with whatever the rest of you say." That is
18 wrong. It is equally wrong for any juror to take an
19 intransigent and obdurate position and say, in effect,
20 "I've made up my mind about this case and when the
21 other ten come around to my way of thinking, then we'll
22 have a verdict." That's wrong.

23 The entire process is a deliberative process.
24 It may be that during your deliberations you may
25 arrive at a tentative verdict. And after discussing

1
2 it with your fellow jurors, you may find that you may
3 in good conscience and consistent with the evidence,
4 give that verdict up and change it, take another
5 position. Nothing wrong in that.

6 That is what we mean by the deliberative process,
7 and exchange of views. In that exchange of views,
8 there is nothing wrong in changing your determination.
9 But it must be based on a reason, found in the evidence.
10 You do not have to justify what you are doing. Nobody
11 is going to ask you, but, in other words, it must be
12 based on reason and common sense and it must be based
13 on the evidence in the case.

14 During your deliberations, you may have reason
15 to communicate with the Court and if you do that, a
16 note will be delivered by the Foreman to the Marshal
17 assigned to the case and when I get it I will take it
18 up with the lawyers.

19 If you ask for evidence, I shall try to find
20 what you are looking for. I shall try to give you
21 only what you ask for and no more. You may ask for
22 the exhibits. I will not send any exhibits in. If
23 you want all the exhibits, then all the exhibits will
24 be sent in. If you want specific exhibits, we will
25 give you those.

1
2 When you shall have arrived at a verdict, then
3 I expect a note from the Foreman of the jury saying,
4 "We have arrived at a verdict." Do not tell me what
5 the verdict is. The verdict will be announced in
6 open court.

7 During your deliberations, do not tell me how
8 you stand at any particular time, whether you are six
9 to five, ten to one, eight to three. I am not inter-
10 ested. I am interested when you have arrived at a
11 verdict and I know that means unanimous.

12 When you have arrived at a verdict, I will
13 call you in. The Foreman will stand up and I will
14 say substantially the following, "Mr. Foreman, in
15 United States of America against Billy Austin, William
16 Moore and Richard Thrasher, on Count 1, how do you
17 find the defendant Billy austin," and you will announce,
18 guilty or not guilty. "How do you find the defendant
19 William Moore, guilty or not guilty." And you'll
20 announce it. "How do you find the defendant Richard
21 Thrasher, guilty or not guilty". And the Foreman
22 will announce it.

23 When he has announced the verdict, then I will
24 turn to Juror Number 2 and say, "You have heard the
25 Foreman announce the verdict. Is that your verdict?"

2 And then Juror Number 3, 4, 5 and then to 11. Then
3 if all agree in open court, then it is the verdict of
4 the jury on Count 1 and then I will go to Count 3,
5 and say on Count 3, "How do you find the defendant
6 Richard Thrasher, guilty or not guilty?" And you will
7 announce the verdict.

8 At this moment I would ask you to leave the
9 courtroom for just a few moments. Do not start your
10 deliberations yet. I must have a talk with the lawyers
11 first. The jury is excused.

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13 (Continued on next page.)
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(The following occurred in the absence of the jury.)

THE COURT: Mr. Caden, any exceptions?

MR. CADEN: No, your Honor.

THE COURT: Mr. Corbett?

MR. CORBETT: No exceptions, sir.

THE COURT: Mr. Schimmel?

MR. SCHIMMEL: No exceptions, if your Honor please.

THE COURT: Mr. Fisher?

MR. FISHER: Your Honor, with regard to your charge about mere presence and knowledge, you indicated that mere presence isn't enough. Mere knowledge is not enough.

Most respectfully, your Honor, I think under United States against Terrell, the reversal as to McDonald in that case, the Second Circuit has indicated the defendant is entitled to that mere presence even coupled with knowledge is not enough.

That's all I'd ask for, your Honor.

THE COURT: All right.

MR. SCHIMMEL: If your Honor pleases, I would have requested that you would add when you were talking about what is to be considered in reaching the verdict, you had mentioned sworn testimony, the

1 stipulations and the stipulated facts. I would
2 request that you would add that part of that is to
3 be considered as the defendant's plea of not guilty.

4 THE COURT: No, no.

5 Anything else?

6 MR. SCHIMMEL: No.

7 MR. CORBETT: I have a request on behalf of the
8 defendant Austin.

9 During the course of the trial, certain evi-
10 dence was admitted, certain testimony was admitted,
11 testimony by Donald James, to the effect that the
12 defendant Austin and he were engaged in a drug
13 conspiracy in 1969, prior to the formation of this
14 conspiracy.

15 In your Honor's charge you did not refer to
16 the fact that was not part of the evidence in this
17 case.

18 THE COURT: Certainly is. It is not part of
19 the conspiracy but if it weren't part of the evidence,
20 I wouldn't have admitted it.

21 MR. CORBETT: No. I should have said not
22 part of the conspiracy. It's respectfully requested
23 that the Court will remind the jury that any evidence
24 of any transactions between Donald James and Billy
25 Austin be not considered as part of the evidence of

1 the conspiracy.

2 THE COURT: May I have that?

3 (Record read.)

4 THE COURT: No. I will just say that it has
5 a limited value and they only be used to determine
6 whether the defendant Billy Austin entered the
7 conspiracy. It has value. It has limited value.

8 It certainly may not be used as a -- I think
9 I charged that during the trial -- may not -- before
10 the conspiracy and certainly cannot be attributable
11 to anybody else.

12 MR. CORBETT: I will withdraw that request,
13 Judge.

14 THE COURT: Surely. Because I charged it
15 before and it may just refresh their recollection.

16 MR. CORBETT: Yes.

17 THE COURT: All right. Bring them in.

18 (Jury present.)

19 THE COURT: In discussing what acts might
20 conceivably bring an accused into the conspiracy, I
21 said to you in effect, the mere fact that an accused
22 happened to be present while conspiratorial activities
23 were in progress or the mere fact that an accused
24 knew what was going in and of itself was not enough
25 to bring an accused into the conspiracy.

Charge of the Court

I just want to make that in the conjunctive and say, even an accused was present and knew hat conspiratorial activites were in progress, it is not in and of itself enough to bring an accused into the conspiracy.

The Government must prove beyond a reasonable doubt that that accused did something affirmatively, wilfully and knowingly, to further the business of the conspiracy before that accused may be found to be a member of the conspiracy.

Shall I excuse the jury for any further discussion on it, gentlemen?

MR. CORBETT: No sir.

MR. SCHIMMEL: No, if your Honor please.

MR. FISHER: No, your Honor.

THE COURT: All right. Will the clerk swear in the marshals?

THE CLERK: Yes, your Honor.

(Two male marshals and one female marshal duly sworn by the clerk.)

THE COURT: I expect your lunch will arrive just about 12:00. If I do not hear from by about a quarter of 12:00 or 10 of 12:00, I may very well release the lawyers and the litigants for their lunch.

Charge of the Court

Now, when they are out of the courtroom, I cannot make any decisions. I must consult with both sides. That is the way it is done.

So if you do not hear from me during that period, I want you to know it is not because I have forgotten you. It is only because I cannot do anything about it.

Do not hesitate to write any notes if you feel that you want the information transmitted to me; but if you do not get an answer, it has been explained to you at this point.

The jury is reminded that you took an oath when you were empanelled and that oath in effect said that you would render a true and just verdict and that means a verdict based on the evidence, in accordance with the law and free of all bias, prejudice or sympathy. I know that you will live up to your oath.

The jury is excused for deliberation on the matter before you.

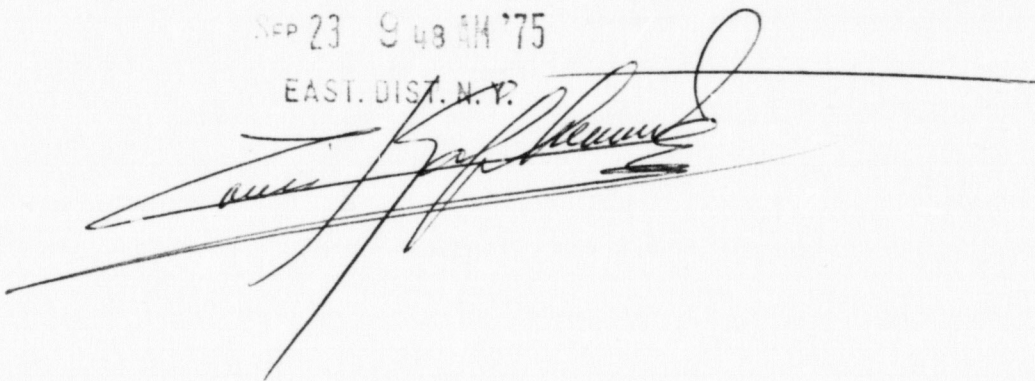
(The jury started deliberations at 11:30 a.m. and the following occurred in their absence.)

MR. FISHER: The indictment isn't going in, is it, your Honor?

RECEIVED
U.S. ATTORNEY

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A large, stylized handwritten signature, possibly reading "James J. [unclear]", is written across the typed text. Below the signature are several horizontal scribbles and lines.